

No. 75-1821

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In the Supreme Court of the United States

OCTOBER TERM, 1976

**ABBOTT LABORATORIES, ROSS LABORATORIES DIVISION,
PETITIONER**

v.

NATIONAL LABOR RELATIONS BOARD

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT**

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION**

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is not yet officially reported. The decision and order of the National Labor Relations Board is reported at 217 NLRB No. 117 (Pet. App. 19a-34a); the decisions in the related representation proceeding are set forth at Pet. App. 35a-93a.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1976 (Pet. App. 18a). The petition for a writ of certiorari was filed on June 16, 1976.¹ The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

¹On July 6, 1976, the Chief Justice denied petitioner's motion for a stay of the lower court's mandate pending disposition of the petition for certiorari.

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly overruled the company's objections to a representation election based on alleged misrepresentations and threats by the union.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 94a.

STATEMENT

A. The Board Proceedings

1. On July 20, 1973, pursuant to a representation petition filed by the Union,² the Board's Regional Director conducted an election among the Company's production and maintenance employees; 22 ballots were cast for the Union and 20 against it. The Company filed timely objections to the election, alleging, *inter alia*, that (1) the Union had engaged in misrepresentations concerning a contract which it had negotiated with another employer; and (2) the Union had threatened employees with physical violence if they did not vote for the Union. After conducting an administrative investigation, the Regional Director issued a Report on Objections, recommending that the objections be overruled and the Union certified (Pet. App. 73a-93a). He subsequently issued a Supplemental Report on Objections, denying the Company's motion for reconsideration (Pet. App. 68a-72a). The Company filed exceptions to both

²Textile Workers Union of America, AFL-CIO, CLC.

reports. The Board adopted the Regional Director's recommendation that certain objections, including the objection based on the alleged misrepresentation, be overruled. However, it directed a hearing on other objections, including the objection based on the alleged threats of physical violence (Pet. App. 64a-67a).

After a hearing on these objections, the Hearing Officer issued a report, recommending that the objections be overruled and the Union certified (Pet. App. 39a-63a). The Company filed exceptions to the Hearing Officer's Report. The Board issued a Supplemental Decision and Certification of Representative, adopting the Hearing Officer's recommendations and certifying the Union (Pet. App. 35a-38a).

The Company refused to bargain with the Union, and the Union filed an unfair labor practice charge. The Board found that the Company had violated Section 8(a)(5) and (1) of the Act, and ordered it to bargain with the Union (Pet. App. 19a-34a).

2. The Company's allegation of misrepresentation involved a letter sent to the employees by the Union three days before the election. The letter pointed out that, within the previous six months, the Union had obtained 12 contracts in Virginia without a strike, and that all of these contracts provided for improved wages and benefits. The letter further stated that the Union had just negotiated, without a strike, a substantial increase in wages and benefits for employees of the Merck Chemical Company in Elkton, Virginia, which was in the same industry as the Company. The Company did not contend that these statements were false, but asserted that the discussion of Merck was misleading because the Union represented only a small number of Merck's employees, those employees were not production and

maintenance employees, and the benefits they obtained were largely the result of coordinated bargaining between Merck and two other unions in which the Union played only a minor role. The Board found that the omission of these facts did not render the statement a misrepresentation (Pet. App. 85a-86a).

The Board also overruled the Company's objection concerning alleged threats. The Hearing Officer, relying largely on the witnesses' demeanor, discredited the testimony of the Company's witnesses that Union adherent Cecil Hall had threatened them with physical violence, and credited Hall's testimony that he had made no such threats. The Hearing Officer also concluded that, while Hall did say he would kick another employee if he did not vote for the Union, the remark was made under circumstances clearly indicating that it was a joke, and that it was so treated by the employees who heard it (Pet. App. 42a-45a). The Board, accepting these determinations, found that no threats had been made (Pet. App. 37a, n. 2).

B. The Decision of the Court of Appeals

The court of appeals (with Senior Circuit Judge Bryan dissenting on the issue of the alleged threats) upheld the Board's decision and enforced its bargaining order. With regard to the alleged misrepresentation, the court "[saw] no error of fact or law in [the Board's] rulings, or lack of substantial evidence to support [its] findings" (Pet. App. 5a, n. *). With regard to the alleged threats, it stated: "Affording the hearing officer's credibility determinations the respect to which they are entitled, we cannot say that the record fails to support his conclusion that the election was not prejudiced by threats of violence" (Pet. App. 10a).

ARGUMENT

1. The principal issue in this case is not, as petitioner suggests (Pet. 22), "whether an inherently deceptive or misleading representation—albeit not false *per se*—constitutes a misrepresentation," but whether the Union's statement that it had obtained increased benefits for Merck employees without a strike was misleading and required invalidation of the subsequent election. Neither the Board nor the court of appeals has adopted a flat rule that truthful statements cannot be misrepresentations; they merely found that no misrepresentation had occurred here. That issue, which depends upon evaluation of the specific facts, does not warrant review by this Court.

In any event, the Board's finding was entirely reasonable. The Union's statement—that employees it represented had received substantial increases in benefits without a strike—was admittedly true. Its truth was not diminished by the fact that employees represented by the Union at Merck may have been in clerical and technical job classifications, or by the fact that the Union may have enhanced its bargaining strength at Merck by linking itself to other unions. Accordingly, the Board could properly conclude that these omissions would not mislead employees about their prospects for improved benefits.

Moreover, "[i]naccurate statements must be considered in the context of the overall campaign material submitted to the voters." *Follett Corp. v. National Labor Relations Board*, 397 F. 2d 91, 95 (C.A. 7). Here, the paragraph about Merck followed a paragraph stating that, within the previous six months, the Union had obtained 12 contracts in Virginia without a strike, and that all of these contracts provided for improved wages and benefits. The Company

does not challenge the accuracy of these statements or claim that the Union was not responsible for these gains. Hence, the reference to the benefits obtained at Merck would not have a significant impact on a voter who had just read the preceding paragraph; it merely adds that one of the 12 contracts mentioned therein involved an employer in the same industry as the Company.

The cases asserted to be in conflict with the decision below (Pet. 18-21) involve omissions of far greater moment. In those cases, for example, the union claimed to have obtained specific wage rates or benefit levels without revealing that the employees in question were not represented by the same union, *National Labor Relations Board v. Maine Sugar Industries, Inc.*, 425 F. 2d 942 (C.A. 1); were in a different locality where wages would normally be higher, *National Labor Relations Board v. Bill's Institutional Commissary Corp.*, 418 F. 2d 405 (C.A. 5); were in more highly skilled, and hence higher-paid, job classifications, *National Labor Relations Board v. Mr. Fine, Inc.*, 516 F. 2d 60 (C.A. 5); *National Labor Relations Board v. Millard Metal Service Center, Inc.*, 472 F. 2d 647 (C.A. 1); or had achieved those wage levels only after a minimum period of service, *Gallenkamp Stores Co. v. National Labor Relations Board*, 402 F. 2d 525 (C.A. 9). Here, the Union gave no specific figures, but merely stated truthfully that the employees it represented in Virginia had obtained increased benefits.

2. The Board's finding that the Union did not engage in threats of physical violence likewise presents only an evidentiary issue which does not warrant further review. Contrary to the Company's contention (Pet. 3, 22-25), the court below did not "grossly misapply" the proper standard of review by accepting the Hearing Officer's determinations of credibility. Such determinations, when based on demeanor, are properly given great weight, for the trier of

fact "sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records," and "the demeanor of a witness . . . may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story." *National Labor Relations Board v. Walton Mfg. Co.*, 369 U.S. 404, 408. The court below noted that some of the Company's witnesses were contradicted by other witnesses or by their own prior statements (Pet. App. 9a-10a), and quoted part of the Hearing Officer's Report which showed that the conduct of the employee supposedly threatened was inconsistent with the fear to which he testified (Pet. App. 7a). Accordingly, the Hearing Officer's credibility findings were not contrary to "overwhelming" evidence (Pet. 3); the credited testimony hardly "carries its own death wound" or the discredited testimony "its own irrefutable truth." *National Labor Relations Board v. Pittsburgh S.S. Co.*, 337 U.S. 656, 660.

Nor is a misapplication of the standard of review shown by the alleged factual errors in the opinion below. Although four alleged errors are cited by the Company (Pet. 23, 24-25, n. 20), those dealing with the misrepresentation issue and the Hearing Officer's alleged conflict of interest³ are not directly relevant to the objection based on the alleged threats. It is likewise immaterial whether Hall was an agent of the Union in view of the finding, upheld by the court below, that Hall made no threats.⁴ Finally, the testimony of employee Tubbs that Hall's threats influenced his vote

³The Board found that the Hearing Officer's refusal to disclose whether he was a member of a union of NLRB employees "was proper as such inquiry is irrelevant to this proceeding" (Pet. App. 37a, n. 1; Tr. 11-14).

⁴Contrary to the Company's contention (Pet. 23, n. 18), the evidence cited by the court below (Pet. App. 10a) supports the Hearing Officer's finding (Pet. App. 50a-51a) that Hall was not an agent of the Union.

in the election is of no aid to the Company (see Pet. 3, 14-15, 23). Since Tubbs' testimony that threats were made was discredited by the Hearing Officer, Tubbs' testimony that they influenced his vote necessarily was also discredited.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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